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CHANGES ARE NOT ENOUGH: PROBLEMS PERSIST WITH NCAA'S ADJUDICATIVE POLICY

*Elizabeth Lombard**

INTRODUCTION

The National Collegiate Athletic Association (NCAA) identifies as “a member-led organization dedicated to the well-being and lifelong success of college athletes.”¹ In seeking to “[p]rioritiz[e] academics, well-being and fairness so college athletes can succeed on the field, in the classroom and for life,” the reach of the NCAA is strong—overseeing over 1117 colleges and universities, 100 athletic conferences, half a million college athletes, 19,750 teams, and 90 championships in twenty-four sports across three divisions.² In addition to the human-capital impact, the financial impact of the organization is just as startling, with the NCAA bringing in over \$1 billion in annual revenue in 2017.³ The footprint of the NCAA is massive, and understandably, with this come ebbs and flows of excessive praise and criticism from its constituents.

Recently, the critical eye of the public has focused on the NCAA’s adjudicative and enforcement policy. The U.S. Department of Justice sparked the spotlight in September 2017, when it revealed it was pursuing criminal charges against collegiate basketball coaches for allegations that include those collegiate coaches accepting bribes in return for steering their success-

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1 *What Is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Sep. 24, 2019).

2 *Id.*

3 Alex Kirshner, *Here’s How the NCAA Generated a Billion Dollars in 2017*, SB NATION (Mar. 8, 2018), <https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017>.

ful players toward multinational shoe companies and similar businesses.⁴ Journalist Alex Kirshner voiced restrained frustration with the idea that the “NCAA gets to have a robust investigation of something it hates more than anything else And it doesn’t even have to do the work[.]”⁵ Criticism surrounding the enforcement procedures of the NCAA continued to soar, as the NCAA announced the results of two high-profile academic-dishonesty cases that followed shortly after this bribery scandal. The combination of the decision that allowed the University of North Carolina (UNC) to escape NCAA infractions after accusations of academic fraud⁶ and the decision, shortly thereafter, to vacate all 2012 and 2013 football victories from the University of Notre Dame “due to academic misconduct by several student-athletes,”⁷ led to a storm of criticism and confusion.

Social media sites serve as a testament to the rampant shock and confusion that the general population has harbored with regard to the enforcement and adjudication process on the heels of these high-profile cases.⁸ Witnessing verified sports reporters and outlets refer to the NCAA as powerless or questioning its purpose or existence altogether is evidence of the NCAA’s trying times in the court of public opinion.⁹ On the one hand, and rightfully so, one might think that this disappointment stems simply from crazed fandom—crazy Notre Dame fans just wanted their way and their wins, or die-hard Duke fans just wanted to see UNC punished.

However, the disappointment is justified, especially when comparing the NCAA’s adjudicative process to that of traditional administrative law. The Commission on College Basketball recognized the gravity of the adjudicative

4 See Alex Kirshner, *FAQ: What’s the FBI Actually Investigating in Its College Basketball Corruption Probe?*, SB NATION (Feb. 25, 2018), <https://www.sbnation.com/college-basketball/2018/2/25/17048132/fbi-ncaa-investigation-charges-crimes>.

5 *Id.*

6 See, e.g., Dan Kane, *NCAA Faces Criticism for UNC Decision*, NEWS & OBSERVER (Oct. 13, 2017), <https://www.newsobserver.com/sports/college/acc/unc/article178784981.html> (“UNC-Chapel Hill escaped NCAA sanctions, in what was one of the longest-running academic scandals in college sports history [S]ome outside of the university said the decision showed the NCAA is *failing in its stated mission* of supporting the educational opportunities for athletes.” (emphasis added)).

7 See, e.g., John I. Jenkins, *A Letter from the President on the NCAA Infractions Case*, UNIV. NOTRE DAME OFF. PRESIDENT (Feb. 13, 2018), <https://president.nd.edu/writings-addresses/2018-writings/a-letter-from-the-president-on-the-ncaa-infractions-case/> (“Our concerns go beyond the particulars of our case and the record of two football seasons to the academic autonomy of our institutions, the integrity of college athletics, and the *ability of the NCAA to achieve its fundamental purpose*.” (emphasis added)). Rev. John I. Jenkins is the president of the University of Notre Dame. *Id.*

8 See, e.g., Dennis Dodd (@dennisdoddcbcs), TWITTER (Feb. 13, 2018), <https://twitter.com/dennisdoddcbcs/status/963490056886513666> (positing that “NCAA just lost Notre Dame” and “pisse[d] off a powerful giant,” raising “questions again [about] why we need NCAA anyway”); see also Balt. Sun Sports (@BaltSunSports), TWITTER (Oct. 14, 2017), <https://twitter.com/BaltSunSports/status/919179007991492609> (“UNC verdict shows NCAA powerless to sanction rampant academic fraud[.]”).

9 Dodd, *supra* note 8; Balt. Sun Sports, *supra* note 8.

process's shortcomings when it issued its "Report and Recommendations to Address the Issues Facing Collegiate Basketball" (the "Commission Report") as a response to the bribery criminal cases, federal indictments, and FBI investigation.¹⁰ The NCAA responded with "swift action" after the report was published.¹¹ By early August 2018, the NCAA broadcasted its "commit[ment] to change."¹² It promised to "tak[e] action" to bring in "outside voices," through the use of "independent investigators and decision-makers to enforce rules."¹³ These new structures and processes promised in the NCAA's August 2018 commitment to change went into effect a year later.¹⁴ The NCAA has made steps in the correct direction with the changes recently put into action. However, this Note argues that both the Commission Report and the NCAA's resulting commitment to change (and now-implemented changes) do not go far enough to improve the state of the NCAA's enforcement and adjudicative process.

Part I of this Note addresses where the status of the NCAA adjudicative process "was"—best evidenced through the infractions hearings of the recent headline cases at the University of North Carolina and University of Notre Dame. Part II addresses how the NCAA's historical adjudicative process compares with traditional administrative law processes. The third and fourth Parts of this Note address the Commission Report and NCAA's subsequent response to the report, along with criticisms of both. Part V raises issues with the adjudicative process that still linger even after these calls for change and responses are implemented. It also addresses potential challenges to these critiques. This Note concludes by considering more generally why this criticism matters.

I. THE OLD WAYS

The 2018–19 Division I Manual includes the NCAA's constitution, operating bylaws, and administrative bylaws, unreflective of the NCAA's recent adjudicative changes.¹⁵ In order to analyze the NCAA's *historical* approach to adjudication, which sparked the public outcry, ignited the Commission Report, and led to the NCAA's commitment to change, this 2018–19 NCAA Division I Manual is operative. Article 19 of the 2018–19 NCAA bylaws, analyzed below, specifically discusses the relevant "Infractions Program."¹⁶

10 COMM'N ON COLL. BASKETBALL, REPORT AND RECOMMENDATIONS TO ADDRESS THE ISSUES FACING COLLEGIATE BASKETBALL 1, 39 (2018), http://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf [hereinafter COMM'N REPORT].

11 *Committed to Change*, NCAA, <http://www.ncaa.org/about/committed-change> (last visited Sep. 24, 2019).

12 *Id.* (capitalization altered); see *Statement from NCAA Leaders on College Basketball Reforms*, NCAA (Aug. 8, 2018), <http://www.ncaa.org/about/resources/media-center/news/statement-ncaa-leaders-college-basketball-reforms>.

13 *Committed to Change*, *supra* note 11 (capitalization altered).

14 *Id.*

15 2018–19 NCAA DIVISION I MANUAL (2018), <http://www.ncaapublications.com/productdownloads/D119.pdf> [hereinafter 2018–19 DIVISION I MANUAL].

16 *Id.* § 19.

The purpose of the NCAA's infractions program has aligned closely with the mission of the organization—to “uphold integrity and fair play” so that those members who do abide by the constitution and bylaws are not “disadvantaged by their commitment to compliance.”¹⁷ The infractions program has been committed to fair procedures and “timely resolution of infractions cases.”¹⁸

In order to appropriately punish wrongdoers and prevent disadvantages for those who follow the rules, the NCAA has implemented a tiered violation structure. According to the 2018–19 bylaws, a Level I violation, a “Severe Breach of Conduct,” is wrongdoing that “provides or is intended to provide a substantial or extensive recruiting, competitive or other advantage, or a substantial . . . impermissible benefit.”¹⁹ Examples include lack of institutional control, academic misconduct, “[c]ash payment[s] . . . provided by a . . . representative of the institution's athletics interests,” or “[f]ailure to cooperate with an NCAA enforcement investigation.”²⁰

A step down in severity are Level II violations, “Significant Breach[es] of Conduct,” which—plainly vague—are violations that do not rise to the level of Level I violations, but are more serious than Level III violations.²¹ Perhaps just as unclear is the description of Level II violations: wrongdoing that provides or is intended to provide “more than a minimal but less than a substantial or extensive recruiting, competitive or other advantage” to the institution.²²

A Level III violation is a “Breach of Conduct” that provides “no more than a minimal recruiting, competitive or other advantage,” such as an “[i]nadvertent violation[].”²³ Ultimately, the strongest interpretative guidance that can be pulled from this three-tiered violation structure is that a Level I violation is more severe than a Level II violation, which is more severe than a Level III violation—with the difference in severity depending on whether “institutional control” existed and the level of “recruiting, competitive or other advantage” the party intended to gain.²⁴ To note that the 2018–19 bylaws, written as broadly and openly as they are, give the interpret-

17 *Id.* § 19.01.1; *What Is the NCAA?*, *supra* note 1. Note that this purpose has not changed with the adoption of the new adjudicative process reflected in the 2019–20 Division I Manual. See 2019–20 NCAA DIVISION I MANUAL § 19.01.1 (2019), <http://www.ncaa.com/publications/productdownloads/D120.pdf> [hereinafter 2019–20 DIVISION I MANUAL].

18 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.01.1.

19 *Id.* § 19.1.1.

20 *Id.*

21 *Id.* § 19.1.2.

22 *Id.*

23 *Id.* § 19.1.3.

24 *Id.* § 19.1. Level IV violations also exist, but these infractions alone will generally not affect intercollegiate athletic eligibility. Level IV violations include “[i]ncidental issues” that the NCAA classifies as “inadvertent and isolated.” *New Violation Structure Introduced*, NCAA (Aug. 1, 2013), <http://www.ncaa.org/about/resources/media-center/news/new-violation-structure>. These infractions are “technical in nature” and provide no more than a negligible competitive advantage to the individual or institution. As such, these

ers of violations substantial power in the gradation determination of an offense is not a particularly provocative claim.²⁵

How much weight has this gradation level carried within the NCAA's adjudicative process? The 2018–19 bylaws list the “core penalties” associated with each violation level.²⁶ Level I and Level II core penalties include post-season play limitations, fines or returns of revenue, scholarship reductions, suspension of coaches, recruiting restrictions, and probation.²⁷ The 2018–19 bylaws allow for departure from the core penalties in cases of extenuating circumstances, and provide a list of additional penalties those deciding may consider—including vacation of records, individual or team, in which a student-athlete competed while ineligible.²⁸ For Level III violations, core penalties include termination of recruitment of a prospective athlete, institutional fines of up to \$5000 (in most circumstances), reduction in the number of financial aid awards allowed, and public reprimand.²⁹

In determining which of the core penalties will attach to the violators, the decisionmakers historically have been asked to consider both aggravating and mitigating factors in their decision-making process.³⁰ Mitigating factors, which “warrant a lower range of penalties for a particular party,” include prompt self-detection and disclosure, acceptance of responsibility, exemplary cooperation with the investigation and adjudicative process, and implementation of a system of compliance to ensure compliance throughout the institution.³¹ On the other hand, aggravating factors such as repeat offenses, historical lack of compliance, lack of institutional control, intentional or blatant behavior, and lack of cooperation through obstruction might warrant a higher range of penalties for a party.³²

As was the case for the decision regarding the gradation of violations, the decision regarding type and extent of punishment is one that has historically endowed the decisionmaker with a substantial amount of power, discretion, and flexibility. Within the classes of Level I and Level II violations, the bylaws have generally granted decisionmakers significant autonomy in deter-

violations are not even discussed in the Infractions Program section of the NCAA's operational bylaws. See 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.1.

25 The 2019–20 Division I Manual did not make any significant changes to the gradation of violations. See 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.1.

26 See 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.9.5.

27 *Id.*

28 *Id.* §§ 19.9.6–7.

29 *Id.* § 19.9.8. No significant changes were made to the penalties available to decisionmakers with the publication of the 2019–20 Division I Manual. Compare 2019–20 NCAA DIVISION I MANUAL, *supra* note 17, § 19.9, with 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.9.8.

30 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.9.2.

31 *Id.* § 19.9.4.

32 *Id.* § 19.9.3. As with the available penalties at the decisionmakers' disposal, the aggravating and mitigating factors have not changed in the wave of the most recent changes to the bylaws. Compare 2019–20 NCAA DIVISION I MANUAL, *supra* note 17, §§ 19.9.3–4, with 2018–19 DIVISION I MANUAL, *supra* note 15, §§ 19.9.3–4.

mining how to punish the noncompliance—from a one-time fine to vacating a national championship, from restricting playoff contention to taking away a scholarship from a 120-athlete roster. The impact of the decisions these men and women have made in terms of gradation and corresponding punishment have been far reaching. Regardless, the NCAA bylaws have historically endowed decisionmakers with a substantial amount of flexibility and autonomy in these powerful, far-reaching decisions.

Who are these decisionmakers, who have traditionally been granted this *substantial* power? While the adjudicative structures and policies already outlined above have remained substantially untouched by the changes effectuated by the 2019–20 Division I Manual,³³ the NCAA's commitment to change has added new players—and ultimately an entirely new track of adjudication—when it comes to adjudicative decisionmaking. These changes are discussed in detail in Part IV of this Note, but an analysis of the previous state of affairs, which sparked the public outcry, is crucial at the outset.³⁴

The NCAA's infractions program has historically been made up of three bodies that have worked together in order to execute the NCAA's rules and regulations and appropriately penalize those who fall short: the Enforcement Staff, the Committee on Infractions, and the Infractions Appeals Committee.

The Enforcement Staff has historically been solely responsible for determining whether an investigation into an alleged failure to comply with the NCAA's constitution and bylaws is warranted.³⁵ The Enforcement Staff has the duty of conducting the investigations on behalf of the entire NCAA to gather all relevant information from the pertinent parties.³⁶ In order to fulfill this responsibility, the Enforcement Staff has provided notices to the institution in question via the institution's presidential office and conducted interviews with institutional employees, directors of athletics, and student-athletes.³⁷

Once this information gathering is complete, if the Enforcement Staff determines that the Committee on Infractions *may* conclude a violation occurred, the Committee on Infractions then takes over.³⁸ Traditionally, the Committee on Infractions has held hearings, in front of a subset of the group called a hearing panel, to make factual findings related to alleged bylaw violations, conclude whether those facts constitute one or more violations, and prescribe appropriate penalties.³⁹ After the hearing, as a part of its delibera-

33 See *supra* notes 17, 25, 29, 32.

34 As a preliminary note, it might be important to acknowledge that each of the decision-making bodies discussed below still exist, but as discussed in Part IV, they now exist alongside a parallel "independent" adjudication system made up of new decision-making bodies.

35 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.5.1.

36 *Id.*

37 *Id.* §§ 19.5.3, 19.5.6.

38 *Id.* § 19.7.1.

39 *Id.* §§ 19.3.3, 19.3.6. In cases involving Level I or Level II violations, the institutions or individuals may elect to pursue a "Summary Disposition Process." *Id.* § 19.6. For this process to unfold, the Enforcement Staff and individuals or institutions must all agree to

tions, the hearing committee has had the opportunity to request new information, request an interpretation from other NCAA departments, or decide and penalize.⁴⁰ The Committee on Infractions has been responsible for subsequent monitoring of compliance with any penalties it prescribes.⁴¹

The institutions then have had the opportunity to appeal a hearing panel's decision.⁴² The Appeals Committee has historically had the authority and responsibility to consider appeals from the Committee on Infractions involving Level I or Level II violations, and in doing so, to affirm, reverse, or remand the panel's findings, conclusions, or penalties.⁴³ Institutions could appeal prescribed penalties to the extent that the Committee on Infractions abused its discretion.⁴⁴ Additionally, institutions could appeal factual findings and conclusions to the extent a factual finding was clearly contrary to information presented, the facts did not constitute a violation, or a procedural error led to the wrong conclusion or finding.⁴⁵

The important decision-making, violation-determining, and punishment-creating Committee on Infractions has had its composition dictated by the NCAA bylaws. The Committee on Infractions has been made up of at most twenty-four members who have been pulled from a list of categories of professionals: current and former college or university presidents, intercollegiate athletic directors, NCAA coaches, representatives from athletic conferences, institutional staff or faculty, athletic administrators with experience in compliance, and general public members with legal training without athletic or collegiate associations.⁴⁶ The Appeals Committee has had only five members, including at least one member of the general public without athletic, conference, or institutional association. The other Appeals Committee members are required to be current or former staff members from an active member institution or conference.⁴⁷ For both the Committee on Infractions and the Appeals Committee, the NCAA bylaws require members to remove themselves when a conflict of interest arises for a specific case they are hearing.⁴⁸

pursue summary disposition. The Enforcement Staff and involved parties will then submit a written report to the Committee on Infractions, including proposed findings of fact, proposed violations, and proposed penalties. The Committee on Infractions will then review the Enforcement Staff's investigation and review the proposed findings of fact, violations, and penalties. It will then either accept or reject the proposals. If penalties and facts and/or violations are accepted, summary disposition results. If findings of fact or violations are not accepted, a full hearing process will ensue. If penalties are not accepted, the institution or individual has the option to either accept the new penalties or pursue a full hearing process. *Id.*

40 *Id.* § 19.7.8.

41 *Id.* § 19.3.6(e).

42 *Id.* § 19.10.2.

43 *Id.* § 19.10. Level III violations have had a separate, but similar, process for responding to actions. *See id.* § 19.11.4.

44 *Id.* § 19.10.1.1.

45 *Id.* § 19.10.1.2.

46 *Id.* § 19.3.1.

47 *Id.* § 19.4.1.

48 *See id.* §§ 19.3.4, 19.4.3.

The historical structure of these two powerful committees is nothing short of contradictory and puzzling. On the one hand, the 2018–19 bylaws indicate that the NCAA has been aware of the importance of independence in this adjudicative process—both in appointing a single general public member to each committee and in requiring members to remove themselves when conflicts arise. On the other hand, however, this commitment to independence collapses given that a majority of both of these boards has been comprised of individuals who compete with and work in the same space as the institutions and individuals they are evaluating, investigating, and punishing.

The proceedings of two recent high-profile NCAA infractions cases demonstrate how this status quo process has worked. In October 2017, the NCAA released its press statement, and decision, with regard to allegations of academic fraud, impermissible student-athlete benefits, and lack of institutional control or compliance procedures brought against the University of North Carolina after an Enforcement Staff investigation.⁴⁹ While the Committee on Infractions did find two violations against a department chair and a curriculum secretary for failure to cooperate with the investigation, UNC successfully avoided violations decisions on any of the other—heftier—institutional allegations.⁵⁰ Using the factual findings brought to them by the Enforcement Staff, the Committee on Infractions found no evidence that the benefits conveyed to the student-athletes were student-athlete specific. Rather, the benefits garnered by the student-athletes were garnered by all students.⁵¹ Hence, in the eyes of the Committee, there was no violation in terms of the university's providing an *athletic* benefit—recruiting, competitive, or otherwise.

Interestingly, the NCAA reveals the names and background of the members of the committee who sit on specific hearings. While the 2018–19 bylaws note that members are drawn from a mix of those with NCAA membership and those from the public,⁵² it appears in the case of UNC that only a single member who weighed in on the institution's decision was not affiliated with the NCAA. The decisionmakers in this case included Greg Sankey, the panel's chief hearing officer and commissioner of the Southeastern Conference (SEC); Carol Cartwright, president emeritus at Kent State University and Bowling Green State University; Alberto Gonzales, dean of the law school at Belmont University and former U.S. Attorney General; Eleanor W. Myers, associate professor of law emerita and former faculty athletics representative

49 *Infractions Panel Could Not Conclude Academic Violations in North Carolina Case*, NCAA (Oct. 13, 2017), <http://www.ncaa.org/about/resources/media-center/news/infractions-panel-could-not-conclude-academic-violations-north-carolina-case> [hereinafter *Infractions Panel*].

50 *Id.*

51 *Id.*

52 See 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.3.1. The bylaws require, to the extent reasonably possible, that each of the abovementioned groups be represented, but do not require, or recommend, any specific quota. *Id.*

at Temple University; Joe Novak, former head football coach at Northern Illinois University; and Jill Pilgrim, an attorney in private practice and the member of the public in this case.⁵³ Though a member of the public, Ms. Pilgrim also has had extensive sports exposure throughout her career—working for USA Track and Field and the Ladies Professional Golf Association.⁵⁴ She is additionally listed as an adjunct law professor for the University of Miami in Florida.⁵⁵

In August 2014, Jack Swarbrick, the University of Notre Dame's director of athletics, and Rev. John Jenkins, C.S.C., the university's president, held a press conference to announce an academic-dishonesty probe Notre Dame's compliance office was conducting, one that implicated some headline football player names.⁵⁶ Rev. Jenkins noted that suspicions had arisen at the conclusion of the summer session that student-athletes had submitted work that was not their own. Notre Dame then initiated a full investigation.⁵⁷ It went on to remove five student athletes from play in the 2014–15 football season as a result of its independent investigation.⁵⁸

In addition to its own investigation, “the institution notified the NCAA enforcement staff of potential NCAA violations.”⁵⁹ The Enforcement Staff then submitted a formal records request and notice of inquiry and began its own NCAA investigation. The Committee on Infractions found “multiple years of academic violations by a former student athletic trainer and football student-athletes” throughout the 2011–12 and 2012–13 football seasons.⁶⁰ Notre Dame argued, and the Committee concurred, that the violations were Level II violations. The Committee prescribed penalties of one-year of probation, a \$5000 fine, a two-year show-cause order, vacation of team and individual records, and dissociation of the former student athletic trainer.⁶¹ Notre Dame appealed only the punishment of the vacation of the wins to the Appeals Committee,⁶² emphasizing its “primacy . . . in addressing core academic matters” and that the university did not have knowledge or involve-

⁵³ *Infractions Panel*, *supra* note 49.

⁵⁴ *Jill Pilgrim*, PILGRIM & ASSOCIATES L. OFF., <http://pilgrim-associateslaw.com/attorneys-2/jill-pilgrim/> (last visited Sept. 25, 2019).

⁵⁵ *Jill Pilgrim*, LINKEDIN, <https://www.linkedin.com/in/jill-pilgrim-74a0021a> (last visited Oct. 20, 2019).

⁵⁶ Eric Hansen, *Notre Dame Response to Fraud Probe Creates More Questions than Answers*, S. BEND TRIB. (Aug. 15, 2014), https://www.southbendtribune.com/sports/college/notre-dame/football/notre-dame-response-to-fraud-probe-creates-more-questions-than/article_9cc003f6-2499-11e4-81d5-0017a43b2370.html.

⁵⁷ *Id.*

⁵⁸ NCAA, UNIVERSITY OF NOTRE DAME PUBLIC INFRACTIONS DECISION 2 (2016).

⁵⁹ *Id.*

⁶⁰ *Id.* at 1. Notre Dame's case proceeded through the summary disposition process. *Id.* For a discussion of the summary disposition process generally, see *supra* note 39.

⁶¹ *Id.* at 2.

⁶² See Emily James, *NCAA Appeals Committee Upholds Vacation of Notre Dame Wins*, NCAA (Feb. 13, 2018), <http://www.ncaa.org/about/resources/media-center/news/ncaa-appeals-committee-upholds-vacation-notre-dame-wins>.

ment in the conduct.⁶³ The Appeals Committee dismissed Notre Dame's argument and upheld the vacation of wins, noting that as a member of the NCAA, Notre Dame must submit to NCAA rules for academic conduct and that a student athletic trainer is considered a university employee.⁶⁴

As was the case for UNC, the NCAA released the names of those who decided the Notre Dame infractions case. Those who heard the initial case included Greg Christopher, vice president for administration and athletics director at Xavier University; Thomas Hill, senior policy advisor to the president of Iowa State University; Greg Sankey, chief hearing officer for the panel, chair of the Committee on Infractions, and commissioner for the Southeastern Conference; Larry Parkinson, director of enforcement for the Federal Energy Regulatory Commission; and Sankar Suryanarayan, university counsel at Princeton University.⁶⁵ Interestingly, the member of the public in this instance, Larry Parkinson, has significant administrative law experience outside the context of sports.⁶⁶ The members of the Appeals Committee who heard Notre Dame's appeal were Ellen Ferris, associate commissioner for governance and compliance at the American Athletic Conference (AAC); Jack Friedenthal, professor emeritus at George Washington University; W. Anthony Jenkins, an attorney in private practice; Patti Ohlendorf, then-vice president for legal affairs at the University of Texas; and David Williams, Appeals Committee chair and then-vice chancellor for athletics and university affairs and athletics director at Vanderbilt University.⁶⁷

Diving deeper into the individuals who played a powerful role in the university's fate reveals an interesting web of connections both with Notre Dame and with one another. Notable is the presence of two conference representatives: the SEC commissioner and the AAC associate commissioner. The University of Notre Dame, while participating in the Atlantic Coast Conference (ACC) for twenty-four of its twenty-six collegiate sports,⁶⁸ is one of very few schools that has refrained from joining a conference in its largest and highest-revenue-producing sport, football.⁶⁹ The fact-based connec-

63 *Id.*

64 *Id.*

65 Emily James, *Former Notre Dame Athletic Training Student Acted Unethically, Committed Academic Misconduct*, NCAA (Nov. 22, 2016), <http://www.ncaa.org/about/resources/media-center/news/former-notre-dame-athletic-training-student-acted-unethically-committed-academic-misconduct>.

66 *Id.*

67 NCAA Appeals Committee Upholds Vacation of Notre Dame Wins, *supra* note 62.

68 See John Heisler, *Notre Dame and the Atlantic Coast Conference: A Whole New Ballgame*, UND.COM (July 1, 2013), <https://und.com/notre-dame-and-the-atlantic-coast-conference-a-whole-new-ballgame/>. Hockey is one of the sports for which Notre Dame does not participate in the ACC. Instead, Notre Dame hockey plays in the Big 10. See Dan Colleran, *Notre Dame Hockey Program to Join Big Ten Conference as Sport Affiliate Member*, NCAA (Mar. 23, 2016), <https://www.ncaa.com/news/icehockey-men/article/2016-03-23/notre-dame-hockey-join-big-ten-conference-sport-affiliate>.

69 See, e.g., UNIV. OF NOTRE DAME, HIGHER EDUCATION ACT REPORTING tbl. 10 (2018), https://und.com/wp-content/uploads/2019/05/EADA_Report_2018-1.pdf. Only six

tions—or, perhaps, conflicts—between these conference-affiliated decisionmakers and Notre Dame clearly run deep. First, Notre Dame competes against the AAC and SEC in twenty-five of its twenty-six sports as an affiliate member of both the ACC and Big Ten. Additionally, Notre Dame competes directly against *all* conferences as it continues to hold out as a football independent. Notre Dame is often openly criticized for its staunch, persistent resistance to conference affiliation in football.⁷⁰

More interesting, however, might be one of the relationships between decisionmakers. Mr. Williams, who was the athletic director of Vanderbilt, an SEC institution, was charged with reviewing the decision made by the Committee of Infractions—a Committee that included SEC commissioner Greg Sankey, the head of Vanderbilt's conference.⁷¹

Of course, one cannot fairly question the actual integrity of the hardworking men and women who decided this case, and they may have indeed been independent in fact. However, quite evidently, they have extensively worked with and competed against one another and the institution that they were evaluating. This was not a coincidence affecting only Notre Dame or UNC, either, but rather a consequence of the intentionally designed nature of the composition of these powerful boards. While the NCAA has accounted for direct conflicts of interest in its bylaws, it is clear that complete independence in adjudication, at least in appearance, has not historically been a priority of the organization.

II. THE ADMINISTRATIVE LAW WAY

A comparison of the NCAA's historical adjudicative panel composition to that of traditional administrative law's decision-making adjudicative bodies enlightens this discussion.

Why might administrative adjudication be an apt comparison for NCAA adjudication? The NCAA operates quite like a federal agency. Like administrative agencies, the NCAA is a bureaucratic organization that serves as neither a legislature nor a court and whose leaders are not elected by the people, while making important decisions that affect individual citizens and the economy.⁷² Like most administrative agencies, the purpose of the

Division I football teams participate in the sport without a conference, including Notre Dame. See *2018 College Football Standings: Independents (FBS)*, FOX SPORTS, <https://www.foxsports.com/college-football/standings?season=2018&group=15> (last visited Sept. 22, 2019).

⁷⁰ Steve Spurrier, former head football coach of the University of Florida and University of South Carolina, reflected this mentality at the SEC Media Days in 2013. "For whatever reason, all 14 [SEC] head coaches thought that Notre Dame should join the ACC and play football like the rest of us . . . [W]hy aren't they in a conference[?]" Matt Smith, *Notre Dame Football: Steve Spurrier Wrong in Criticism of Irish Independence*, BLEACHER REP. (July 21, 2013), <https://bleacherreport.com/articles/1711525-notre> (first alteration in original) (quoting Steve Spurrier).

⁷¹ See *supra* text accompanying notes 65 and 67.

⁷² See WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 1, 12 (4th ed. 2000).

NCAA—fostering the safety and success of collegiate athletes—is focused and limited in scope. However, like agencies, the NCAA’s reign and discretion within these subject-matter boundaries is broad, general, and far-reaching.⁷³ Within their areas of expertise, agencies and the NCAA have three main duties and authorities with regard to their decisionmaking: rulemaking, adjudication, and informal action.⁷⁴ In many ways, the adjudication process of agencies is similar to the adjudication process in the NCAA—permitting oral hearing and examination in front of the organization’s self-appointed adjudicators, who preside solely over organization-specific matters, without the formal rules of evidence or comprehensive rules of discovery under the Federal Rules of Civil Procedure.⁷⁵ The two adjudicative processes diverge, however, with the requirement of the presence of a “neutral presiding officer” in the form of an administrative law judge (ALJ) in agency adjudication and the historical absence of such a requirement—and in fact the requirement of the contrary—in NCAA adjudication.⁷⁶

The administrative process in the United States is governed mostly by the Administrative Procedure Act (APA). Written in 1946, the Act established the adjudicative process in administrative agencies, the right for individuals to have an agency hearing, allowing all interested parties the opportunity for “submission and consideration of facts [and] arguments,” and notice upon decision.⁷⁷ Section 3105 of the U.S. Code requires each agency to “appoint as many administrative law judges as are necessary” for these proceedings, so long as these judges do “not perform duties inconsistent with their duties and responsibilities as administrative law judges.”⁷⁸

The requirement that administrative adjudicators not participate in inconsistent activities is the root of the impartial-adjudicator requirement for decisionmakers in agency hearings. Ultimately, “provisions for the appointment of impartial, independent [h]earing [e]xaminers are the very heart and soul of the Administrative Procedure Act.”⁷⁹ Independence is mandated both in fact and in appearance. In-fact independence is the sort of conflict-of-interest prevention that has historically been addressed in the NCAA bylaws. However, independence in appearance is more complicated. While there might not be an “inherent reason” to “believe that [a] commissioner[],” for example, “necessarily act[s] with bias merely because of [her] role within the agency, due process and its neutral adjudicator requirement are concerned not only with actual judicial wrongdoing, but also with the possibility or appearance of bias.”⁸⁰

73 See *id.* at 3.

74 See *id.* at 18.

75 *Id.* at 19.

76 *Id.*

77 5 U.S.C. § 554(c) (2012).

78 *Id.* § 3105.

79 *Borg-Johnson Elecs. v. Christenberry*, 169 F. Supp. 746, 753 (S.D.N.Y. 1959).

80 Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 315 (2018).

Thus, the question is not only whether an adjudicator (e.g., the SEC commissioner or a former Northern Illinois football coach) had bias against an institution (e.g., Notre Dame or UNC). The question is also whether the “average man” assuming the simultaneous positions of adjudicator and his outside role—conference commissioner, collegiate coach, or collegiate athletic director, for example—would be tempted “to forget the burden of proof required,” or “not to hold the balance nice, clear and true.”⁸¹ The question is also whether the conference commissioner or collegiate coach appeared to have been tempted by outside influences, as perceived by a third-party observer.

So, who are these administrative law judges who are given this substantial grant of decision-making power? How are they selected and trained? The selection of and requirements demanded of ALJs were recently updated through the combination of the Supreme Court decision in *Lucia v. Securities and Exchange Commission*⁸² and President Trump’s subsequent executive order, effective July 10, 2018.⁸³ Prior to the Supreme Court holding and executive order, ALJs were selected through a process run by the Office of Personnel Management, which included an examination and competitive service-selection procedures.⁸⁴ The Court in *Lucia* held that ALJs must be selected under the Constitution’s Appointments Clause.⁸⁵ Under section 3(a)(ii) of the resulting executive order, ALJs are now required to hold a professional license to practice law, with agencies prescribing additional qualification requirements as needed.⁸⁶ President Trump, now charged with the duty of selecting ALJs, recognized the “significant duties” and “significant discretion” these ALJs have when conducting proceedings in today’s massive and expanding administrative state.⁸⁷ President Trump also recognized the increasing importance of these decisionmakers, since they function as “the final word of the agencies they serve.”⁸⁸ Regardless of the lifting of the requirement of the examination and competitive service-selection procedures, the appointment of an individual as an ALJ certainly remains an honor bestowed upon legal professionals with exceptional “temperament, legal acumen, impartiality, and sound judgment.”⁸⁹

81 *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

82 138 S. Ct. 2044 (2018).

83 Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).

84 *Id.*

85 *Lucia*, 138 S. Ct. at 2055 (“ALJs are ‘Officers of the United States,’ subject to the Appointments Clause.”). The Appointments Clause of the U.S. Constitution grants the President the power to nominate, and “with the Advice and Consent of the Senate,” appoint “all other Officers of the United States.” U.S. CONST. art. II, § 2, cl. 2. *Lucia* thus holds that ALJs must be nominated by the President and appointed through subsequent approval of the Senate.

86 Exec. Order No. 13,843, 83 Fed. Reg. at 32,755.

87 *Id.*

88 *Id.*

89 *Id.*

The requirement of sound “temperament, legal acumen, impartiality, and sound judgment” looms large in comparison to the historical requirements for the *one* outside legal personnel required to serve on the NCAA Committee on Infractions and Appeals Committee. The 2018–19 bylaws dictate that at least one member must be pulled from “[m]embers of the general public with formal legal training who are not associated with a collegiate institution, conference, or professional or similar sports organization and who do not represent coaches or athletes in any capacity.”⁹⁰ On the surface and at first glance, this requirement for an individual with legal training *might* seem to be the NCAA’s attempt to mimic the requirements imposed on decisionmakers in traditional administrative law. In reality, however, the NCAA’s historical requirement falls significantly short. The contrast between a legally trained “[m]ember[] of the general public” and a President-appointed, law-licensed individual exhibiting “temperament, legal acumen, impartiality, and sound judgment” is stark.⁹¹

Only at a bare minimum level does the NCAA’s token legal member resemble a traditional ALJ. Both must have legal training, and both must have no conflicts of interest (i.e., independent in fact). However, even if one were to equate the requirements of the two roles, problems persist. Why would only *one* member of the twenty-four be held to meet the standards that track the requirements, at a minimum, for ALJs—judicial knowledge and independence? Only one of twenty-four members meets the bare minimum standard that this country has demanded in administrative law for impartial and neutral adjudication. Notably, this individual might not even be included in every hearing in front of the Committee.⁹² A hearing panel may, therefore, align with NCAA bylaws and successfully avoid inclusion of a *single* individual with an ALJ’s *bare minimum* requirements—judicial expertise and independence in fact.

The NCAA bylaws, even as they stood before the commitment to change, have shown hints of a desire for neutral adjudication—by including the category of public members with legal experience and no collegiate sports ties as a subgroup to select from and by attempting to eliminate conflicts of interest. However, the NCAA has historically stopped short. It stops short of independence in fact *and* appearance. Until it attains the independence in fact and appearance, like that sought after through the implementation of ALJs in traditional administrative law, the NCAA will face continual criticism in the court of public opinion. For a public that has grown accustomed to the independence in fact and appearance in the pervasive, ever-expanding administrative state, the lack of independence, at least in appearance, of the

90 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.3.1(g).

91 Exec. Order No. 13,843, 83 Fed. Reg. at 32,755.

92 Hearing panels are made up of not less than five but not more than seven individuals pulled from the pool of twenty-four on the Committee. 2018–19 DIVISION I MANUAL, *supra* note 15, § 19.3.3. A hearing panel may, therefore, align with NCAA bylaws and avoid inclusion of any individual with the administrative law minimum requirements—judicial expertise and independence in fact and appearance.

adjudicators in NCAA cases will lead to nothing short of confusion, distrust, lack of confidence, and even lack of legitimacy.

III. THE RICE COMMISSION ON COLLEGE BASKETBALL'S WAY

After the indictments were handed down from the Department of Justice, and in the midst of the FBI's investigation of college basketball, the NCAA asked the Commission on College Basketball for a report to "assess the state of [college basketball] and to recommend transformational changes to address multiple issues and challenges" that were present.⁹³ The Commission, charged in April 2018 by the NCAA to identify "bold legislative, policy and structural modifications," was led by Dr. Condoleezza Rice.⁹⁴ The Commission was made up of thirteen other members, including the University of Notre Dame's president, the chairman of USA Basketball, various athletic directors, the owner and vice chairman of a National Basketball Association franchise, and the current president of the NCAA, Mark Emmert.⁹⁵ These accomplished, bright, sports-minded individuals set out on an important task—one they recognized was needed.

The Commission noted the state of college basketball was "deeply troubled," recognizing levels of corruption and deceit so high that they "threaten[ed] the very survival" of college basketball altogether.⁹⁶ The Commission, in providing its lengthy and thorough list of recommendations, attempted to realign the NCAA and college basketball around its central mission: the commitment to the college degree for and education of the *student-athlete*.⁹⁷ In order to recenter and refocus the organization in the midst of dangerous levels of corruption and deceit, the NCAA asked the Commission to focus on three areas: (1) the relationships between the NCAA, its members, their student-athletes and coaches, and third parties; (2) the relationship between the NCAA and the NBA; and (3) the creation of the "right relationship" between the NCAA and its member institutions "to promote transparency and accountability."⁹⁸

The recommendations to the NCAA, which revolved around these areas of improvement, were broken up into four sections in the Commission's report. The changes enveloped in section 1 were dedicated to providing "[r]ealistic [p]athways" to success by (1) eliminating the one-and-done track that allows college athletes to pursue NBA play after just one year of college

93 COMM'N REPORT, *supra* note 10, at 1.

94 *Commission on College Basketball Charter*, NCAA, <http://www.ncaa.org/governance/commission-college-basketball-charter> (last visited Nov. 23, 2019). Dr. Rice previously served both as sixty-sixth U.S. Secretary of State and as provost of Stanford University. *Id.*

95 COMM'N REPORT, *supra* note 10, at 15–16.

96 *Id.* at 1.

97 *Id.* at 2. The Commission noted that an important metric for a collegiate sport's success is its graduation rate. College Basketball's rate lagged significantly behind that of other sports, with the Department of Education estimating that less than one-half of college basketball student-athletes graduated in 2017. *Id.* at 2 & n.1.

98 *Id.* at 15.

play; (2) allowing student-athletes to test their professional prospects without losing amateur status; (3) allowing student-athletes to access professional agents' advice at an earlier time; and (4) standardizing degree completion programs and funding the completion of degrees for students who pursue profession sports before graduating.⁹⁹ The changes recommended in section 2 revolved around neutral investigation and adjudication of "[s]erious [i]nfractions" and seek to increase responsibility and accountability of both institutions and individuals.¹⁰⁰ Section 3 discussed ways to mitigate nonscholastic, harmful influences on college basketball by (1) increasing transparency of finances; (2) enlisting apparel companies to join in on the transparency and accountability; (3) establishing youth NCAA programs; and (4) adopting rule changes around the college recruiting process.¹⁰¹ Section 4 suggested the NCAA incorporate a "[s]ignificant [c]adre" of public members to the NCAA's Board of Governors, breaking up the current dominance of institutional presidents or chancellors.¹⁰²

Immediately evident in the report is the Commission's recognition of the rampant problem of the lack of independence throughout the NCAA. Both section 2 and section 4, half of the recommendations, are dedicated to removing and replacing individuals who have "skin in the game" from important decision-making roles. In the same way President Trump pledged throughout his campaign to "drain the swamp" in D.C.,¹⁰³ it appears the Commission on College Basketball is attempting to "drain the swamp" in Indianapolis—at the NCAA's headquarters. Section 2 focuses on neutral decisionmaking in the context of the adjudicative and enforcement arm of the NCAA, while section 4 seems to go a step further and asks for independence in the NCAA's highest governance body, the Board of Governors.

While the recommendations included in section 2 are most relevant to a critique of the adjudicative processes of the NCAA, it is worth discussing briefly the section 4 recommendations. The Commission recommended the NCAA restructure its Board to mirror the makeup of a public company or, perhaps more appropriately, an established nonprofit company, by incorporating outside board members to "provide objectivity, relevant experience, perspective and wisdom" in their decision-making roles throughout the organization.¹⁰⁴ The Commission was so serious and committed to the need for independence at the top of the organization that it asked for the NCAA's "prompt[]" identification of eligible candidates and even volunteered the Commission's continued assistance in assembling "a first-rate list of candi-

99 *Id.* at 3–9, 29–38.

100 *Id.* at 9–11, 38–44. The changes recommended in this section are most relevant to this Note's analysis and will be discussed in more detail below.

101 *Id.* at 11–12, 44–50.

102 *Id.* at 14, 51.

103 See Brett Samuels, *Trump: 'It May Not Look Like It, but We Are Draining the Swamp,'* HILL (Apr. 12, 2018), <https://thehill.com/homenews/administration/382883-trump-it-may-not-look-like-it-but-we-are-draining-the-swamp>.

104 COMM'N REPORT, *supra* note 10, at 14.

dates.”¹⁰⁵ The Commission on College Basketball is evidently committed to independent leadership and decisionmaking in a way the NCAA has historically shied away from.

The Commission's recognition of the value of independence in “provid[ing] objectivity, relevant experience, perspective, and wisdom” did not stop at the top.¹⁰⁶ In section 2, it recommended “draining the swamp” in the adjudicative arm of the NCAA as well. A deep dive into these recommendations is necessary.

First, the Commission recognized a need for “prompt radical transformation” in the way the NCAA investigates and enforces its rule violations and infractions.¹⁰⁷ The Commission was cognizant that the current view of the NCAA and collegiate athletics, in the court of public opinion, is that the system is a “broken” one.¹⁰⁸ The Commission recognized a tension—that decisionmakers in these infractions cases “are volunteers and NCAA members” who “face perceived conflicts of interest in adjudicating . . . with adverse consequences for the credibility of the process.”¹⁰⁹ This promise for independence *does* appear “radical,” and necessary, on its face.

Almost immediately, however, this “*radical*” change was reined in and limited. The Commission recommended that all infractions cases be divided into two categories—(1) cases involving “complex or serious violations,” a class of cases they referred to throughout the report as “complex cases,” and (2) “all others.”¹¹⁰ For all “complex cases,” the Commission recommended that the NCAA go back to the drawing board and start from scratch, “creat[ing] an entirely new process for investigating and deciding.”¹¹¹ It further recommended the infusion of “paid, independent decision makers, such as lawyers, arbitrators and retired judges” to replace the current panel of volunteers and NCAA members.¹¹² For “all others,” however, the current system—the one the Commission deemed “broken” and in need of “prompt radical transformation”—will stand.¹¹³

Given that the Commission deemed only one branch of cases deserving of independence and its resulting “objectivity, relevant experience, perspective and wisdom,”¹¹⁴ one might assume that careful detail was provided regarding how exactly and who exactly will make the determination of who is worthy. One would hope serious thought and time were devoted and will be devoted toward the determination of which cases are complex and which are

105 *Id.*

106 *Id.*

107 *Id.* at 38.

108 *Id.* at 39. For a reflection of the current public opinion revolving around the NCAA, see *supra* notes 4–9 and accompanying text.

109 COMM’N REPORT, *supra* note 10, at 39.

110 *Id.* at 38–39.

111 *Id.* at 39.

112 *Id.*

113 *Id.* at 38–39. For a thorough evaluation and criticism of the historical system of adjudication, see *supra* Parts I–II.

114 COMM’N REPORT, *supra* note 10, at 14.

not. Unfortunately, clarity was absent. The Commission, somewhat in passing and quite vaguely, described complex cases as cases where “large sums of money and serious reputational damage is at stake.”¹¹⁵ The Commission provided no other identifying characteristics of complex cases. It did recognize it left open the complex classification as a pending “threshold question” for the NCAA—suggesting that potentially either the NCAA, the institutions, or both could have the power to deem cases complex, while also suggesting the NCAA has the final word on whether the classification is appropriate.¹¹⁶

The Commission continued by describing further suggestions for the newly constructed adjudicative body—but notably, still only to be implemented in the course of hearing “complex” cases, while the other cases are stuck with the old way. The Commission recommended that the NCAA have the new independent decisionmakers form a pool from which three random adjudicators would be called upon at the commencement of each infractions case.¹¹⁷ The panel would operate under the rules of the American Arbitration Association, making decisions of the panel “final and binding, subject to review only under the Federal Arbitration Act.”¹¹⁸

Ultimately, the Commission recognized that it *is* time. It even recognized that “[i]t is time for independent adjudication”—but, for some reason, it only recognized this for certain cases: the “NCAA’s complex cases.”¹¹⁹

IV. THE NEW NCAA WAY

In the aftermath of the high-profile and highly criticized Notre Dame and UNC infractions cases, the Department of Justice indictments, the FBI investigation, and the “radical” requests from the Commission on College Basketball, the public was left with numerous questions and anxiously awaited the NCAA’s answers.

The Division I Council met in mid-June 2018 to develop legislation in response to the Commission’s presentation of recommendations to the Board of Governors, a short month and a half prior.¹²⁰ In August 2018, the Council presented the legislation to the Division I Board, which culminated with the Division I Board’s approval and its taking action on the legislation.¹²¹ The Division I Board of Directors came out with a message that it was “committed to change”—taking action in three broad, important areas.¹²² First, it announced it was committed to changes in basketball in allowing for greater “freedom and flexibility” revolving around “going pro” and even paying for scholarships for those who come back to finish their degrees later, while working to minimize the power and leverage of “harmful

115 *Id.* at 39.

116 *Id.* at 39 n.28.

117 *Id.* at 39.

118 *Id.*

119 *Id.*

120 *Committed to Change*, *supra* note 11.

121 *Id.*

122 *Id.* (capitalization altered).

outside influences.”¹²³ Second, it announced it would act to increase accountability through a more efficient investigations and infractions process and by setting stronger penalties for individuals and institutions.¹²⁴ Lastly, and most relevant to the discussion here, the NCAA looked to embrace “outside voices” by bringing in “independent investigators and decision-makers to enforce rules” and by adding “public voices to the NCAA Board of Governors.”¹²⁵ This third arm of the commitment to change, a commitment proudly brandished on the NCAA’s website, seemed to track closely with section 2 of the Commission report discussed in detail above—but a deeper dive into the details of bylaw changes proposed and eventually enacted is necessary before true comparisons and contrasts can be drawn. The NCAA’s broadcasted commitment to change was finalized and formalized in August 2019, when the NCAA reflected these changes in its 2019–20 Division I Manual and corresponding 2019–20 bylaws.

In a bolded title on its website, the NCAA promised to provide “[i]ndependent investigators and decision-makers” through legislative change.”¹²⁶ But how? The NCAA’s answer is its “Independent Accountability Resolution,” formalized in article 19.11 of its 2019–20 bylaws.¹²⁷ The NCAA’s solution is adding more players to its adjudication game. In an attempt to “prevent conflicts of interest,”¹²⁸ the NCAA mirrors the two-track system of infractions suggested by the Commission on College Basketball. Complex cases, and *only* complex cases, are eligible for its new, “independent process.”¹²⁹ The others are left with the old, historical—and rightfully, highly criticized¹³⁰—adjudicative system. As such, the “old way” of adjudication discussed in detail in Part I of this Note still coexists alongside this Independent Accountability Resolution track.

The NCAA has deployed new groups to help implement its version of “independent” adjudication, including the Independent Accountability Oversight Committee,¹³¹ the Infractions Referral Committee,¹³² the Complex Case Unit,¹³³ and the Independent Resolution Panel.¹³⁴ Each group plays a unique role.

The Independent Accountability Oversight Committee, made up of three public members of the NCAA Board of Governors and the chair and

123 *Id.*

124 *Id.*

125 *Id.* (capitalization altered).

126 *Independent Investigators and Decision-makers*, NCAA, <http://www.ncaa.org/about/independent-investigators-and-decision-makers> (last updated Oct. 31, 2018). These committed changes went into effect August 1, 2019. *Id.*

127 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.11.

128 *Independent Investigators and Decision-makers*, *supra* note 126.

129 *Id.*

130 *See supra* Parts I–II.

131 *See* 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.11.2.1.

132 *See id.* § 19.11.2.2.

133 *See id.* § 19.11.2.4.

134 *See id.* § 19.11.2.3.

vice chair of the Division I Board of Directors,¹³⁵ is charged with general oversight of the independent enforcement and infractions processes, nominating individuals to the other new groups, and devising new policies and procedures as an ongoing improvement mechanism.¹³⁶

The Infractions Referral Committee reviews and makes decisions on requests made from eligible parties for their case to be deemed complex. Accordingly, a case is not *automatically* considered complex after a request is made by the institution, athlete, or NCAA, but rather the case must first pass the muster of the Infractions Referral Committee.¹³⁷ Similar to the suggestion made by the Commission, the NCAA has embraced a model where multiple parties have the opportunity to *request* that a case be considered complex.¹³⁸ It is the duty of the Infractions Referral Committee to make the ultimate decision regarding complexity.¹³⁹ On its website, the NCAA provides some examples of what types of cases will likely be deemed complex cases including “alleged violations of core NCAA values, such as prioritizing academics and the well-being of student-athletes; the possibility of major penalties; or adversarial behavior.”¹⁴⁰ The 2019–20 bylaws build on these examples by contributing a few additional factors for consideration in the referral determination and also provide a guiding principle—for the committee to refer cases when the NCAA’s best interests are served by resolving the case independently.¹⁴¹ The bylaws circularly call for the committee to refer to “independent” adjudication when “independent” adjudication seems necessary.¹⁴² This referral decision is “final, binding and conclusive, and not subject to further review”—meaning a case deemed noncomplex is stuck with the traditional nonindependent adjudication track once the Infractions Referral Committee decides it should be so.¹⁴³ Notably, the Infractions Referral Committee, which ultimately holds the burden of deciding whether a case is deserving of independence, is itself *not* fully independent. The Committee has five members, only one of whom is an independent member of the Independent Resolution Panel, with the rest all being members of various Division I committees.¹⁴⁴

Once the Infractions Referral Committee deems a case complex, the case is referred over to the Complex Case Unit.¹⁴⁵ The Complex Case Unit serves as the investigation unit of the new system—made up of external investigators with no institutional affiliations along with NCAA-associated Enforce-

135 *Id.* § 19.11.2.1.1.

136 *Id.* § 19.11.2.1.5.

137 *See id.* § 19.11.2.2.5; *Independent Investigators and Decision-makers*, *supra* note 126.

138 *See* 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.11.3.2.1.

139 *Id.* § 19.11.3.2.4.2.

140 *Independent Investigators and Decision-makers*, *supra* note 126.

141 *See* 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.11.3.1.

142 *Id.*

143 *Id.* § 19.11.3.2.4.2.

144 *See id.* § 19.11.2.2.1; *Independent Investigators and Decision-makers*, *supra* note 126.

145 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.11.2.4.3.

ment Staff.¹⁴⁶ The Complex Case Unit determines if more facts surrounding the case are needed and, if so, conducts the investigation.¹⁴⁷

Finally, once a case has been deemed complex and the factual investigation is complete, the Independent Resolution Panel takes over.¹⁴⁸ The Independent Resolution Panel will have fifteen members—all “with legal, higher education and/or sport backgrounds who are not staff members at an NCAA member institution or conference.”¹⁴⁹ This group will be charged with overseeing the case and deciding on appropriate penalties.¹⁵⁰

The NCAA broadcasted its self-proclaimed commitment to change. It formalized this change—in part, through an incorporation of independent, or outside, voices into the important decision-making roles throughout the organization. This incorporation of outside voices, however, is not a total infiltration. Certain cases are deemed unworthy of the benefits of these outside voices, by a group of predominately nonindependent decisionmakers.

V. PROBLEMS PERSIST

The NCAA's solution to its adjudicative crisis became effective August 1, 2019.¹⁵¹ An analysis of the problems that persist temper enthusiasm around this official unveiling of an “independent” system of adjudication. The first problem that presents itself with the NCAA's—and therefore also the Commission on College Basketball's—plan for improvement is the idea that only certain cases are deserving of independent judgment.

A recognition and an analysis of the consistent incorporation of independent adjudication in traditional administrative law reflects the importance of independence in fact and appearance.¹⁵² The concept that adjudicators must not perform acts “inconsistent” with their roles is central to administrative law adjudication.¹⁵³ Found originally in the APA and consistently accounted for even in the most recent executive order by President Trump, independence is a priority.¹⁵⁴ While the NCAA is in many ways parallel to an administrative body,¹⁵⁵ it historically has—and now continues to—diverged from administrative law in this respect, in refusing to commit to top-to-bottom independence in fact and appearance for its adjudicators and adjudicative process. Public companies are required to have outside inter-

146 *Id.* § 19.11.2.4.1.

147 *Id.* § 19.11.2.4.3.

148 *Id.* § 19.11.2.3.5.

149 *Id.* § 19.11.2.3.1.

150 *Id.* § 19.11.2.3.5.

151 See 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.11; NCAA *Unveils Independent Investigation Unit*, NBC SPORTS (Aug. 1, 2019), <https://collegebasketball.nbcsports.com/2019/08/01/ncaa-unveils-independent-investigation-unit/>.

152 See *supra* Part II.

153 See 5 U.S.C. § 3105 (2012).

154 See *supra* notes 77–89 and accompanying text.

155 See *supra* notes 72–76 and accompanying text.

vention,¹⁵⁶ ALJs are required to be outsiders, and yet, the NCAA is consistent in its belief that not all cases are worthy of independence—independence that so many other bodies have demanded.

Even the Commission on College Basketball itself, notably led in part by the NCAA's president, Mark Emmert, explicitly recognizes the crucial role independence plays in the adjudicative process—noting outside members bring “objectivity, relevant experience, perspective and wisdom.”¹⁵⁷ The NCAA, itself, on its “committed to change” homepage, notes independence for investigators and decisionmakers is necessary to prevent dangerous conflicts of interest.¹⁵⁸ Yet both the Commission on College Basketball and the NCAA, after recognizing the powerful role independence plays in adjudication and decisionmaking more generally, refuse to commit wholeheartedly to such independence. For whatever reason, only “[c]ases deemed complex [are] eligible for [the] independent process”¹⁵⁹—therefore, only cases deemed complex are worthy of “objectivity, relevant experience, perspective and wisdom.”¹⁶⁰ Only cases deemed complex are worthy of a process devoid of “conflicts of interest.”¹⁶¹ Imagine if the Securities and Exchange Commission, the Federal Trade Commission, or the Social Security Administration decided today, after years of explicitly preaching the value of independence, that only certain individuals and certain institutions were deserving of this independence in hearings. The certain outrage that would ensue in response to this *hypothetical* inequity around these administrative bodies should also be garnered toward the *actual* processes and structures the NCAA has recently enacted.

One potential response to the critique of this dual-path compartmentalization that the NCAA has enacted might be an argument for efficiency: that speed in adjudication should be prioritized over the values of independence—“objectivity, relevant experience, perspective and wisdom”¹⁶²—in cases that are, for one reason or another, not “complex” enough. *Even if* one were to assume that speed or efficiency has more value than independence in certain cases, the argument's premise is flawed.

Both the Commission on College Basketball and the NCAA voiced efficiency concerns when planning the overhaul of the NCAA's “broken” system of deceit and corruption. The Commission recognized that the process of adjudication in many cases took “years” and punishment would not be enacted until “long after the departure of [the] bad actors” from the respon-

156 For a review of independence requirements for board members of public companies, see *Independence Requirements for Board Members*, MORRISON & FOERSTER (Apr. 6, 2004), <https://www.mofo.com/resources/publications/independence-requirements-for-board-members.html>.

157 COMM'N REPORT, *supra* note 10, at 14–15.

158 *Committed to Change*, *supra* note 11 (capitalization altered).

159 *Independent Investigators and Decision-makers*, *supra* note 126.

160 See COMM'N REPORT, *supra* note 10, at 14.

161 See *Independent Investigators and Decision-makers*, *supra* note 126.

162 COMM'N REPORT, *supra* note 10, at 14.

sible institutions.¹⁶³ It also recognized the public's view of the process as "too slow."¹⁶⁴ The NCAA explicitly sought to address the concern for expedited adjudicative processes, stating that its new rules provide "[m]ore efficient infractions resolutions."¹⁶⁵ The historical lack of efficiency in the adjudicative process is easily reflected in both the Notre Dame and UNC infractions cases.¹⁶⁶

Efficiency is undoubtedly a problem, but the dual-path compartmentalization of complex cases and everything else is *not* the solution, because the premise—that the compartmentalization would increase efficiency—is unsound. On the contrary, such compartmentalization would likely *decrease* efficiency. Under the new system, a new speed bump will be added to the already bumpy process—the classification of cases as complex or not by the Infractions Referral Committee. The process will include the waiting time—both for the eligible parties to make their petition for their case to be considered for classification, and for the Infractions Referral Committee to make its decision. Despite the NCAA's and Commission on College Basketball's commitments to increasing accountability by decreasing the time between infraction and decision, they are somehow still willing to add time for this classification process to unfold. Even if having some cases decided by nonindependent, inside voices saves time or money as compared to the indepen-

163 COMM'N REPORT, *supra* note 10, at 39.

164 *Id.* The Commission went on to recommend two procedural avenues to increase efficiency in response to these concerns: (1) a process for preliminary injunctive relief; and (2) a time limit for submissions and decisions of infractions cases, akin to a statute of limitations. *Id.* at 39–40.

165 *More Efficient, Binding Enforcement System*, NCAA, <http://www.ncaa.org/about/more-efficient-binding-enforcement-system> (last updated Aug. 8, 2018).

166 The University of Notre Dame's adjudicative process concluded with a decision from the Infractions Appeals Committee on February 13, 2018. See *NCAA Appeals Committee Upholds Vacation of Notre Dame Wins*, *supra* note 62. Notre Dame originally announced its knowledge of the potential infraction during a press conference on August 15, 2014. See *Video: Notre Dame Announces Academic Investigation*, S. BEND TRIB. (Aug. 15, 2014), https://www.southbendtribune.com/multimedia/videos/video-notre-dame-announces-academic-investigation/video_a5bec25e-24d9-11e4-810d-001a4bcf6878.html. Therefore, Notre Dame's case took three years, five months, and twenty-nine days to resolve, with most of the involved students having graduated before the hearing concluded. Two of the involved students returned to complete their degree years later, while playing professional football. See Chris Roling, *KeiVarae Russell Finished Degree at Notre Dame During Bengals OTAs*, USA TODAY (July 7, 2018), <https://bengalswire.usatoday.com/2018/07/07/keivarae-russell-degree-notre-dame-bengals-otas/>; Ralph Vacchiano, *Brooklyn Native Ishaq Williams Signs Contract with Giants to Complete Comeback Story*, N.Y. DAILY NEWS (May 7, 2016), <https://www.nydailynews.com/sports/football/giants/vacchiano-ishaq-williams-signs-giants-complete-comeback-article-1.2628938>. For the University of North Carolina, the institution received its first notice of allegations in May 2015. See Andrew Carter, *Why NCAA Report on UNC Academic Case Was Not Released on Oct. 6*, NEWS OBSERVER (Oct. 5, 2017), <https://www.newsobserver.com/sports/college/acc/unc/unc-now/article177205461.html>. The Committee on Infractions did not complete its decision until October 13, 2017—two years and five months later—without any appeal process involved. See *Infractions Panel*, *supra* note 49.

dent, outside voice prong of the process,¹⁶⁷ any gains in that arm of the process will likely be negated by the losses in efficiency due to this new classification process. The argument for dual-path compartmentalization in the NCAA's adjudicative process in the name of efficiency is, therefore, a mistaken one. A new speed bump is simply not the answer, especially when the problem is a lack of speed.

Even if one were to accept the NCAA's dual-path compartmentalization as the appropriate mechanism for independent adjudication, a problem still persists with regard to the procedural process of how those worthy of the independence—"complex" cases—are selected. The NCAA has allowed institutions to self-report their cases as "complex." The process, wisely, allows institutions to play a role in opting into a conflict-of-interest-free, independent adjudicative process. But, arguably, that is where the wisdom of the process stops.

A request for an independent adjudicative process does not automatically result in approval of an independent adjudicative process. The institutions must first pass through nonindependent, internally run, conflict-of-interest-infested gates before they enter into the world of independence and objectivity.

The request for classification as complex must be approved, first, by the Infractions Referral Committee.¹⁶⁸ It is worth reemphasizing the makeup of this decision-making body that holds the important power of flipping the switch from conflict-of-interest decisionmaking into objective decisionmaking. The Infractions Referral Committee has five members. One of these members comes from the Independent Resolution Panel¹⁶⁹—and thus is a "member[] with legal, higher education and/or sport background[] who [is] not [a] staff member[] at an NCAA member institution or conference."¹⁷⁰ This is a great start, but it is not enough. The remaining four members of this important decision-making body are one Division I Committee on Infractions member, one Division I Infractions Appeals Committee member, and the Division I Council chair and vice chair.¹⁷¹ All four of these members are thus internal NCAA members.¹⁷²

One-fifth. Only *one-fifth* of this body is independent and objective. Only *one-fifth* is equipped with the desirable "objectivity, relevant experience, perspective and wisdom" of which the Commission on College Basketball preached. Only *one-fifth* is free of "conflicts of interest" of which the NCAA noted it was concerned. The single outside, independent voice is surely silenced here by the internal, conflicted voice of the majority—or

167 Neither the Commission nor the NCAA has offered evidence to prove or argue this point.

168 *Independent Investigators and Decision-makers*, *supra* note 126.

169 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.11.2.2.1.

170 *Id.* § 19.11.2.3.1.

171 *Id.* § 19.11.2.2.1.

172 For a description of the makeup of the Committee on Infractions and the Infractions Appeals Committee, see *supra* notes 46–47 and accompanying text.

supermajority, at eighty percent. If the opinion of the weak outside arm of this group were to diverge from the opinion of the internal arm, the internal arm will win decidedly, every time.

There is something undoubtedly contradictory about the NCAA recognizing the cruciality and importance of an objective voice—spending time, energy, and money constructing that objective voice—but then spending time, energy, and money restricting access to that objective voice by making a predominantly nonindependent, internally voiced body the all-powerful gatekeeper to this promised land.

However, *even if* one were to accept the five-member Infraction Referral Committee as the appropriate decisionmaker in regard to the complex versus noncomplex decisions, concern over *how* it will come to this conclusion still abounds. The guidance provided by both the Commission on College Basketball and the NCAA with regard to qualifications for this “complex” classification was slim. The Commission implied that complex cases are those with “large sums of money and serious reputational damage [] at stake.”¹⁷³ It identified the question of complexity as a “threshold question”—and potentially suggested some cases should be designated, by nature of the potential penalty, as “complex as a matter of rule.”¹⁷⁴

Unfortunately, the NCAA did not provide much more clarity surrounding the “complex” distinction in its plans for revamping the adjudicative process. The NCAA provided some examples of complex cases: “alleged violations of core NCAA values, such as prioritizing academics and the well-being of student athletes; the possibility of major penalties; or adversarial behavior.”¹⁷⁵ These “examples,” unfortunately, are neither clear-cut nor instructive. The NCAA has seven core values.¹⁷⁶ Determining whether an institution’s alleged infraction violates the core value of the “highest levels of integrity and sportsmanship” or threatens the core value of “[p]residential leadership of intercollegiate athletics at the campus, conference and national levels” is not a black-and-white matter but instead a subjective question of degree.¹⁷⁷ The possibility of “major” punishments is another question of degree. Is a \$1000, \$10,000, or \$100,000 penalty “major”? Is one win, a season of wins, or the “death penalty”¹⁷⁸ “major”? The description of “adver-

173 COMM’N REPORT, *supra* note 10, at 39.

174 *Id.* at 39 n.28.

175 *Independent Investigators and Decision-makers*, *supra* note 126.

176 The NCAA’s seven core values are (1) the collegiate model of athletics, (2) the highest levels of integrity and sportsmanship, (3) the pursuit of excellence in both academics and athletics, (4) the supporting role that intercollegiate athletics plays, (5) an inclusive culture, (6) respect, and (7) presidential leadership. *NCAA Core Values*, NCAA, <https://web.archive.org/web/20181207085920/http://www.ncaa.org/about/ncaa-core-values> (last visited Nov. 11, 2018).

177 *See id.*

178 Institutions may receive repeater-violation penalties, also known as the NCAA’s version of the “death penalty,” for major violations in certain circumstances. *See Enforcement Process: Penalties*, NCAA, <http://www.ncaa.org/enforcement/enforcement-process-penalties> (last visited Nov. 22, 2019).

sarial” nature does not draw any clearer lines for the interpreter. Lastly, the NCAA neglected to adopt the suggestion from the Commission on College Basketball to allow for certain cases to be complex as a matter of rule. The formalization of the “Standard for Referral” and “Referral Factors” within the 2019–20 Division I Manual do little more, if anything, to enlighten.¹⁷⁹ The NCAA rejected the suggestion for automatic categorization that would have eliminated at least some of the subjectivity of the compartmentalization process.

Finally, the dual-path compartmentalization may lead to a distorted system that unfairly separates the “haves” from the “have-nots.” Institutions that have excess resources at their disposal will be able to fight for their spots in the complex, independent arm of the process, but institutions endowed with less resources or a stricter budget will be forced to give up the fight and proceed with less process and a lack of independence. Not only is this separation of the “have” institutions from the “have-not” institutions troublesome on the surface, but it is especially troublesome when considering the impact the division will have on precedent. Summary disposition and nonlitigated cases carry the same precedential weight as cases in which parties fully contest and argue the charges against them, such as the UNC’s and Notre Dames of the world.¹⁸⁰ Unless the NCAA changes its process to recognize some level of precedential value—perhaps “noncomplex” or nonindependently decided case decisions should be entitled to less weight—problems persist. Poorly argued and nonindependently decided cases will bleed into the independent arm of the adjudicative process through the power of precedent.

Not only is the dual-path compartmentalization operated primarily by a nonobjective, internally voiced group of individuals, but the underlying process of determination itself is subjective. The power of deciding whether an individual is worthy of independent decisionmaking—and the “objectivity, relevant experience, perspective and wisdom” that results—is a subjective decision held in the hands of subjective decisionmakers. The inability to appeal these all-important decisions is chilling as well. Problems undoubtedly persist.

CONCLUSION: WHY IT ALL MATTERS

The NCAA identifies itself as “a member-led organization dedicated to the well-being and lifelong success of college athletes.”¹⁸¹ One way the NCAA has recently shown its commitment to the well-being and lifelong success of college athletes is through its renewed “commit[ment] to change”

179 2019–20 DIVISION I MANUAL, *supra* note 17, § 19.11.3.1.

180 The 2019–20 Division I Manual does not give any indication that the cases decided by the summary disposition are given any less weight in terms of precedent. In fact, the only cases flagged within the Manual as having less precedential value are those with a “negotiated resolution,” which are given no precedential value. *See id.* § 19.5.12.4.

181 *What Is the NCAA?*, *supra* note 1.

through the incorporation of “outside voices” in the adjudicative process.¹⁸² Unfortunately, however, the commitment is only half-hearted.

The reasonable follow-up question to this analysis might be: *Why does this all matter?* Why does independence matter—is it not *just* sports or *just* a game after all? While the general public might easily deem questions presented in front of the Securities and Exchange Commission, the Federal Trade Commission, or the Social Security Administration as high stakes, the argument for why collegiate sports should be treated with the same level of seriousness and be granted the same level of independence and objectivity might not be as commonly or easily understood.

The NCAA is about *more* than sports. What is at stake in NCAA adjudications is more than win-loss records or eligibility for rivalry weekend; more than a sliver of a loss to a coach's multimillion-dollar salary or from the millionth dollar an institution brings in from football weekends. What *is* at stake is young athletes' livelihoods.

As the Commission on College Basketball recognized, collegiate sports present unparalleled opportunities for young people. “We know . . . that many young men [and women] who would otherwise have little chance of attending college are able to take advantage of their talents to achieve something of great value in our society and economy—a college degree”—through the gift of collegiate sports and the NCAA.¹⁸³ The degrees student-athletes receive from some of the best institutions in the world are often made possible only through the scholarships afforded to them through member institutions. With the estimated lifetime benefit of a baccalaureate degree approaching nearly \$1 million,¹⁸⁴ the Commission on College Basketball is not exaggerative in concluding that the effects of these degrees trickle down for generations.¹⁸⁵ While in some ways a scholarship taken away from a football powerhouse as a penalty from an NCAA adjudicative process might seem like nothing,¹⁸⁶ that is one fewer individual who gets to “achieve something of great value in our society and economy” by earning a college degree.

The NCAA recognizes in its mission statement that its decisions should revolve around the betterment of its students,¹⁸⁷ and therefore of its institu-

182 *Committed to Change*, *supra* note 11.

183 COMM'N REPORT, *supra* note 10, at 1.

184 *Id.* at 8 & n.11 (first citing ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, *THE ECONOMIC VALUE OF COLLEGE MAJORS* 5 fig. 3 (2015); and then citing *The Rising Cost of Not Going to College*, PEW RES. CTR. (Feb. 11, 2014), <https://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college/>); cf. Jay Weiner & Steve Berkowitz, *USA TODAY Analysis Finds \$120k Value in Men's Basketball Scholarship*, USA TODAY (Mar. 29, 2011), https://usatoday30.usatoday.com/sports/college/mens-basketball/2011-03-29-scholarship-worth-final-four_N.htm (estimating the annual value of a typical basketball scholarship at \$120,000 annually, when accounting for “goods, services and future earnings”).

185 COMM'N REPORT, *supra* note 10, at 1.

186 Or even might be exciting if the penalty comes down on your school's biggest rival.

187 See *What Is the NCAA?*, *supra* note 1.

tions that educate them. However, in its rapid response to recent outrage around the corruption and deceit that is preventing the accomplishment of its mission, the NCAA falls short and hence, unfortunately, problems persist.